HARVARD
LAW REVIEW.

VOL. VI. MAY 25, 1892. NO. 2.

RECENT STATE CONSTITUTIONS.

TO the American statesman and jurist there is no more important subject than the manner in which we make and change our organic law, our constitutions. We have abundant material for such a study; for although but little more than a century of our national history has run, we have already held two hundred constitutional conventions. There has thus gradually grown up in the United States a new branch of law, — one which, perhaps yet in its infancy, is still developing and growing.

We propose to examine now the four latest instances of constitution-making. Two of these new constitutions are framed by old States, *i. e.*, Mississippi and Kentucky, and two belong to the last States admitted to the Union, *i. e.*, Wyoming and Idaho.

Wyoming was organized as a Territory in 1869, and its tenth Legislative Assembly, which convened in 1888, memoralized Congress for the passage of an enabling Act, that it might become a State. Favorable reports on such an Act were made in both Houses of the Fiftieth Congress, but Congress adjourned without taking action thereon. Assuming that the next Congress would sanction their course, boards of county commissioners of a large majority of the counties passed resolutions requesting the Territorial officers to divide the Territory into districts, to apportion the number of delegates each district should be entitled to, and to issue a call for the voters therein to elect delegates to a convention to

frame a constitution which should be submitted to popular vote, — all according to the manner provided in the bill then pending before the United States Senate.

Pursuant to these requests, the Governor, Chief-Justice, and Secretary of the Territory met at the capitol, June 3, 1889, divided the Territory into suitable districts for the election of delegates, and apportioned the number of delegates for each district; and the Governor of the Territory issued a proclamation directing that an election be held throughout the Territory on the second Monday in July, 1889, for the choice of delegates to a Constitutional Convention to assemble at Cheyenne on the first Monday of September.

In obedience to this call of the Governor, fifty-five delegates were chosen, and September 2, 1889, forty-nine delegates, representing every county and both political parties, convened in the capitol at Cheyenne, and proceeded to frame a constitution, which was afterwards submitted to the popular vote, and was ratified by five sixths of the votes cast.

Although this may seem to be an informal mode, there having been no enabling Act passed by Congress, numerous precedents for such a course might be cited, for Vermont, Kentucky, Tennessee, Maine, Michigan, Arkansas, Florida, Iowa, Wisconsin, California, and Oregon proceeded in the same way to gain admission into the Union. And the subsequent admission of the State into the Union by Congress of course sanctioned the method pursued.

Idaho was organized as a Territory by Act of Congress, March 3, 1863, with the capital at Lewiston; but this was moved to Boise City in 1864.

No formal application for admission to the Union was made by the Legislature, but a general popular demand brought about the issuance of a proclamation by the Governor of the Territory for the election of delegates to a constitutional convention to convene at Boise City, July 4, 1889, to frame a State constitution; the qualification of delegates to this convention to be such as were then required by the laws of the Territory for members of the Territorial Legislative Assembly; the delegates to take the same oath of office required for such members; the election to be conducted, the returns made, the results ascertained, the certificates to persons elected to be issued, and the qualifications for voters thereat to be the same as were then provided by the laws of the Territory for general elections therein; the convention to be composed of

seventy-two members, as apportioned in this proclamation to the various counties in the Territory. The election thus provided for was held June 2, 1889, and the Constitutional Convention assembled at Boise City, July 4, 1889. It completed its work with rapidity, the constitution drafted being signed by sixty-six members, August 6, 1889. It provided for the submission of the constitution to the voters of the Territory on the 5th of November, 1889.

Pursuant to these provisions, the election was held November 5, 1889, and the constitution was ratified by a large majority. As thus enacted, it was presented to Congress, and the State of Idaho was admitted into the Union on the 3d of July, 1890.

The constitution we are next to examine is the fourth in Kentucky, not including the Secession Constitution of 1861; the first having been adopted in 1792, the second in 1799, and the third in 1849.

Under the influence of the wave of democratic ideas that about that time swept over the country, the latter instrument provided that the judiciary should be elected by the people. It provided also that all voting should be *viva voce*, which rendered it impossible to pass a ballot-reform law. Although it stipulated that the State could not incur any debt in excess of $500,000, it did not provide against unlimited indebtedness of counties, towns, and cities. The natural consequence followed, that although the State was practically free from debt, the municipal indebtedness was very large. The recognition of slavery also had to be expunged. Many attempts to remove this recognition from the constitution of 1849 had been made, but all failed, because the provision concerning amendments thereof was so severe that to carry through any amendment whatever was almost impossible. Article 12 provided that first a majority of all the members elected to each house shall, within the first twenty days of any regular session, concur in passing a law for taking the sense of the people as to the necessity and expediency of calling a convention; and if at the next general election a majority of all the voters in the State are in favor thereof, then the next General Assembly shall direct the same to be done again; and then, if a majority of all the voters shall have voted for a convention, the next General Assembly shall pass a law calling a convention.

For the reasons given above, and in accordance with these provisions, in 1887, out of 300,339 registered voters, 175,362 voted in

favor of calling a convention; and in 1889, out of 296,700 registered voters, 180,280 voted again for a convention.

The convention met at Frankfort, September 8, 1890, and was called to order by Governor Buckner. It consisted of one hundred delegates, of whom sixty were lawyers, twenty farmers, thirteen doctors, the remaining seven being capitalists, bankers, and merchants. The "Louisville Courier-Journal," the leading paper in the State, said that it included, as a rule, the best and most conservative men of the State.

It is not proposed to follow the history of the convention in detail. As the work progressed, it became manifest that no preservation of the old constitution with amendments and additions would do, but that a new constitution must be drafted. The convention continued in session until April, 1891, amidst much hostile criticism by the newspapers of the State as the results of its labors became manifest. Notwithstanding this, upon submission of the new constitution to the voters in August, 1891, it was ratified by a large and unexpected majority, in spite of the vigorous opposition of the "Louisville Courier-Journal" and other leading newspapers of the State. The convention was in session two hundred and fourteen days, and cost the State $130,754, not including printing, mileage, stationery, coal, and gas; the total cost being estimated by opponents of the constitution as probably $200,000.

In February, 1890, the Legislature of Mississippi passed an Act to call a convention to amend the constitution of the State. In accordance therewith, the delegates chosen met in Jackson, August 12, 1890, — ninety-eight in number, out of a total of one hundred and forty-four.

The work of this convention was not submitted to the people for ratification or rejection, but went into effect and became the supreme law in Mississippi by the mere fiat of the convention. At the end of the constitution we find these words: "This constitution, adopted by the people of Mississippi in convention assembled, shall be in force and effect from and after this the first day of November A. D. 1890."

On September 4, 1890 (Journal, p. 148), the Judiciary Committee, having been instructed to inquire into the constitutional power of the convention to adopt finally on behalf of the people of Mississippi the constitution which may be framed by it, without a submission of the question of ratification or rejection to the qualified electors of the State, reported that the proposition that such a

submission is necessary to give validity to the constitution "has no support in any principle of constitutional law, and is merely a political theory or doctrine which has, in some of the States, acquired authority from usage. The doctrine has never prevailed in this State, and has here no sanction from usage."

And again, October 30, 1890, (Journal p. 549), the Judiciary Committee reported that, in the judgment of the committee, submission of the new constitution to the people for ratification or rejection is unnecessary and inexpedient.

But Jameson on Constitutional Conventions, 4th ed., sections 410, 411, says, with great force,— and his opinion is supported by the best usage and authority,— that thus to make a new constitution operative without ratification by the people is wholly inadmissible, unless the law has so expressly provided. "The reason is that it would make of the convention a simple despot. . . . The history of liberty has shown that the most direct road to the ruin of a free State is to make a single popular assembly the dispenser of the ordinary law."

Besides this, the convention also exercised extraordinary power in passing "ordinances." One of these (Journal, p. 690) extended the terms of State officers. Another (Exemption Ordinance, Journal, p. 696) exempted from taxation for ten years "all permanent factories in this State hereafter established while this section is in force, for working cotton, wool, silk, furs, or metals, and all other manufacturing implements or articles of use in a finished state. Any factory which has been abandoned for not less than three years, and commencing operations within two years from the date of the adoption of this constitution, shall be entitled to such exception. This section may be repealed or amended by the Legislature after five years, and if not so repealed, shall remain in force until January 1, 1900, and no longer."

That is to say, this convention has impliedly declared that not even the people (through the Legislature) can, for five years to come, undo the work of this convention in exempting certain property from taxation.

It would seem that the whole ordinance is *ultra vires* and utterly void. It may, however be held, in the case of any one embarking in business in the State upon the faith of this exemption ordinance, and in the absence of legislation revoking it, that the State would be estopped from denying the legality and validity of the exemption.

There is certainly no excuse for the passage of such an ordinance, especially by a convention that does not submit its work to the electors for ratification. If this be legal, nothing they may pass is illegal. But there is some excuse for the ordinance extending the term of State officers until the new dates for election established in the constitution. The general principle is that a constitutional convention has power to pass ordinances or resolutions that are necessary and incidental to the completion of its work. So it is proper for a constitutional convention to fix a proper mode (*i. e.*, the mode now known as "Ballot Reform") to ascertain the will of the people on the question of ratification or rejection of the new constitution, and to do this in the shape of an ordinance, outside the constitution itself, because it is temporary. But this convention erred in its mode of establishing Ballot Reform for *all* State elections. If it decided in favor of Ballot Reform, and wished to legislate itself on the subject, it should have put the provision into the constitution. What is gained by having this outside the constitution, as an ordinance? It would have been much better to leave the whole matter to the Legislature, for doubtless time will soon disclose necessary amendments which now can only be introduced by amending the organic law itself.

It would be a curious subject of inquiry, what power this convention had to waive the payment of all moneys due the State for swamp-land, under an Act of the Legislature of the State. (See "Swamp Land Ordinance," Journal p. 693.)

As was to be expected, the most difficult subject the Mississippi Convention had to deal with was the race question; in every possible form does this problem of the negro keep turning up. Thus (p. 304 of the Journal), a resolution was introduced and referred to the Judiciary Committee, requesting this committee to report upon the legality and practicability of separating and apportioning the school fund of the State and counties to the white and black school children respectively, and whether such separation would be a violation of the Federal Constitution. The subject does not seem to have been reported upon; but section 207 of the new constitution provides that "Separate schools shall be maintained for children of the white and colored races." [1]

[1] So in Kentucky, it is provided, section 174, in distributing the school fund, no distinction shall be made on account of race or color, but separate schools for white and colored children shall be maintained. Wyoming, Art. VII, Sec. 19, provides that no distinction or discrimination shall be made in its public schools on account of sex, race, or color.

Another proposition was (p. 352) that in all counties or school districts levying taxes to maintain schools for more than four months in the year, such additional taxes paid by whites should be applied to the maintenance of white schools, and those paid by negroes should be applied to maintain colored schools; with power to the Legislature to provide that such levy may be different in the same county as between the whites and blacks. This amendment was defeated by a small majority,— fifty-three yeas to fifty-seven nays.

A similar but even more sweeping amendment was proposed, providing that the Legislature shall have power to divide the school fund, so that all white schools should be supported by the funds collected from the white race, and all colored schools should be supported by the funds collected from the black race. It was laid on the table,—eighty-one yeas, twenty-one nays (Journal, p. 356 and 357).

It was also proposed to disqualify persons of color from holding office, as before stated; but common-sense finally prevailed, and (p. 485) the Judiciary Committee reported that having considered the subject, in their opinion such a provision would violate the spirit of the Constitution of the United States and the legislation of Congress in pursuance thereof, and would provoke the enforcement of the constitutional guarantee to the people of the United States of a republican form of government; whereupon the subject was dropped.

But the key-note to this new constitution of Mississippi is to be found in the provisions concerning the suffrage. After providing, in section 241, as usual, that electors shall consist of the male inhabitants twenty-one years of age, etc., and in section 243 for a uniform poll-tax on every male inhabitant of the State, to be used in aid of the common schools, section 244 provides that every elector shall also be able to read any section of the constitution, or shall be able to understand the same when read to him, or give a reasonable interpretation thereof.

Reading between the lines, it is easy to see that the effort is here made, while ostensibly acting in accordance with the Fourteenth Amendment to the Constitution of the United States, to set up a system under which whites can vote, and blacks cannot. For with the strong race feeling in the South, and with the offices and power in the possession of the whites, it will prove an easy matter for a board of registration to find that all white applicants are able

to understand a section of the constitution when read to them, or can give a reasonable interpretation thereof, and that no black man can do either. If this be sustained by the United States Supreme Court, it furnishes an easy way to evade the Fourteenth Amendment, and other Southern States will soon follow the same course.

Mr. Bryce, in the "North American Review," for December, 1891, p. 657, well says, concerning this section of this constitution: "This curious provision might, no doubt, be so administered by a perfectly upright and impartial authority as to admit substantially competent and exclude incompetent persons, irrespective of color. But it has a suspicious air. One may conjecture that a white official will be more readily satisfied with the 'reasonable interpretation' which a brother white gives of some section, say this section, of the constitntion, than with the explanation tendered by a negro applicant. Such discrimination will be all the easier because illiterate whites as a rule understand the matter better than illiterate negroes."

Great credit is certainly due to every Southern State that explicitly denies in its constitution the right of secession, after the sacrifices and bloodshed it passed through between 1861 and 1865 to establish that right. Mississippi takes this stand, and its noble course must be cited in its own words: "Section 7. The right to withdraw from the Federal Union on account of any real or supposed grievance, shall never be assumed by this State, nor shall any law be passed in derogation of the paramount allegiance of the citizens of this State to the government of the United States." There was opposition to this section, and a substitute was proposed, declaring that the State, a "co-equal member of an indissoluble Federal Union of indestructible States," would never assume the right to withdraw from the Union. A member of the convention, General Lee, the officer who carried the order to open fire on Fort Sumter in 1861, said to the convention he was convinced that secession was not only impracticable, but was wrong, and he believed that those who had carried muskets for four years in the service of the Confederacy were of the same conviction; whereupon the proposed substitute was voted down.

Mississippi (sec. 15) and Kentucky (sec. 25) in their new constitutions explicitly state that slavery is forbidden. While this is of course only in conformity with the Thirteenth Amendment of the Constitution of the United States, and in the constitutions of Northern States would be passed by as a matter of course, yet in

the constitutions of the old Slave States it is evidence of the complete official recognition and acceptance of the new order of things, and as such is worthy of note.

In his excellent paper on "Recent Constitution-making in the United States," in the September, 1891, number of the "Annals of the American Academy of Political and Social Science," Professor Thorpe, speaking of a similar clause in the Constitution of North Dakota, cites it as an illustration of the persistence of political ideas long after the necessity for the prohibition has passed away. For certainly the clause is unnecessary in any constitution, now that the Thirteenth Amendment has abolished slavery in the United States. But such a clause in the new constitution of an old Slave State has a very different meaning. It has there the peculiar force of express denial of that which was formerly so dear to their citizens, and to perpetuate which they ventured all and lost so much.

As regards the qualifications required to exercise the right of suffrage, all these new constitutions are liberal, and in line with the prevailing spread of democratic principles (except as above noted). In Mississippi (sec. 241), every male inhabitant of the State, except idiots, insane persons, and Indians not taxed, who is a citizen of the United States, duly registered, etc., and twenty-one years old (omitting other details not important here), is declared to be an elector. Similar liberality is shown in Kentucky (sec. 151). In Idaho (Art. VI. sec. 2), every male citizen of the United States, twenty-one years old, six months a resident in Idaho, duly registered, is a qualified elector, and women may continue to hold such school offices and vote at such school elections as while Idaho was a Territory. The danger of polygamy has made it necessary for this State (Art. VI. sec. 3), to exclude polygamists, as well as Chinese and Indians not taxed, — the latter a common provision. Wyoming bears off the palm in liberality, and is the first State to adopt female suffrage. Art. VI. Sec. 1, provides that the right of citizens of the State to vote and hold office shall not be denied or abridged on account of sex, and that both male and female citizens of the State shall equally enjoy all civil, political, and religious rights and privileges. Electors shall be citizens of the United States (Art. VI. sec. 5), and able to read the Constitution of the State (Art. VI. sec. 9).

Mr. Thorpe, in his excellent article on the constitutions of North Dakota, South Dakota, Montana, and Washington, already referred

to, after tracing the various currents of immigration that have peopled the Western and Pacific States, says (p. 11) that the recent coast stream has combined both Northern and Southern elements, and reaching Washington and Montana by a backward flow, presents for the first time in our national history a meeting of Northern and of Southern elements north of the latitude of Kansas. We have been informed by high authority — one of the judges of the Supreme Court of Wyoming — that the same admixture of Northern and Southern elements is to be found in Wyoming, the men being often Northerners, and therefore generally Republicans, and the women Southerners and Democrats. There are many marriages between these apparently discordant elements, yet both the husband and the wife exercise their right of suffrage with no more friction than do the members of a business firm, or of a family who do not agree in politics.

While thus on the subject of equal rights, irrespective of sex, let us note the provision in Mississippi (sec. 94), that the Legislature shall never create any distinction between the rights of men and women to acquire, own, enjoy, and dispose of property, or to contract in reference thereto; and married women are declared to be fully emancipated from all disability on account of coverture. It is to be hoped that intelligent legislation will follow immediately, for, without it, nice questions will arise (or probably already have arisen) whether dower and tenancy by the curtesy are abolished, or which shall prevail as the law for both sexes.

The Australian Ballot Reform has now been so generally adopted throughout the United States that we are not surprised to find it adopted in all these constitutions (Kentucky, sec. 154; Idaho, Art. VI. sec. 1; and Wyoming, Art. VI. sec. 11). Mississippi (sec. 240) declares that all elections by the people shall be by ballot, adopting the Australian system by an elaborate "Election Ordinance," after section 285, already referred to.

An examination of some of the new features in the Bills of Rights of these new constitutions shows the trend of political development at the present day. We may here group various provisions that show the prevalent tendency towards an extension and equalization of rights, irrespective of sex, race, or nativity.

In Wyoming (Art. I. sec. 3), "Since equality in the enjoyment of natural and civil rights is made sure only through political equality, the laws of this State affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any

circumstance or condition whatsoever other than individual incompetency or unworthiness, duly ascertained by a court of competent jurisdiction."

And in the same State (Art. I. sec. 29), "No distinction shall ever be made by law between resident aliens and citizens as to the possession, taxation, enjoyment, and descent of property."

In Idaho (Art. I. sec. 20), "No property qualification shall ever be required for any person to vote or hold office, except in school elections, or elections creating indebtedness."

The provisions in Mississippi (sec. 94), against any distinction between the property rights of men and women and the emancipation of married women from all disability on account of coverture, are also noteworthy.

Perhaps the singular provision in Kentucky (sec. 24), "Emigration from the State shall not be prohibited," would come under this head, although it is not easy to conceive of any denial of the right to live wherever one pleases in the United States!

Equally marked is the prevalent tendency towards humanitarianism shown in these Bills of Rights (Wyoming, Art. I. sec. 15), "The penal code shall be framed on the humane principles of reformation and prevention."

Wyoming (Art. 1, sec. 12), "No person shall be detained as a witness in any criminal prosecution longer than may be necessary to take his testimony or deposition, nor be confined in any room where criminals are imprisoned."

So of the provisions prohibiting imprisonment for debt, unless fraud be found (Idaho, Art. I, sec. 15; Wyoming, Art. I. sec. 5), or strong presumption of fraud; and the debtor shall not be continued in prison after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law (Kentucky, sec. 18).

See also Idaho, Art. XIII., entitled "Immigration and Labor," and Wyoming, Art. XIX. sec. 1, "Concerning Labor" ("eight hours' actual work shall constitute a lawful day's work in all mines and on all State and municipal works"), and sec. 1, "Labor Contracts," making unlawful all contracts or agreements waiving liability for injuries to the person.

Kentucky (sec. 21) even goes so far as to provide that "the estate of such persons as shall destroy their own lives shall descend or vest as in cases of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof."

All four of these Bills of Rights contain inhibitions of criminal proceedings by information, except in cases arising in the land or naval forces, or in the militia in actual service in time of war or public danger, etc. (Mississippi, sec. 27; Kentucky, sec. 12; Idaho, Art. I. sec. 8; Wyoming, Art. I. sec. 13); but in the latter State it may be otherwise provided by law. Here is probably another instance of survival. Certainly in a democracy, where the prosecuting officer is elected by the people, there is no danger of abuse of the power of proceeding by information.

In the matter of trial by jury, Idaho (Art. I. sec. 7) provides that in civil actions three fourths of the jury may render a verdict, and the Legislature may provide that in all cases of misdemeanors five sixths of the jury may render a verdict.

Wyoming (Art. I. sec. 9) provides that a jury in civil cases, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law. A grand jury may consist of twelve men, any nine of whom, concurring, may find an indictment; but the Legislature may change, regulate, or abolish the grand-jury system.

In some of these changes of the common law in these States, as in similar changes made in Washington, Montana, North and South Dakota (see Prof. Thorpe's article already cited, p. 175), we see the common-sense embodiment of the idea now so prevalent that the rule requiring uniformity of opinion on the part of a jury should be given up. The result will be watched with interest in other States that so far have lacked courage to make the change; and if successful, as it probably will be, will soon be followed.

The persistency of political ideas long after the cause for the existence of laws to enforce them is past, is well illustrated by the provisions in these new constitutions preserving the right of the jury to determine the law as well as the facts in cases of libel (Mississippi, sec. 13; Kentucky, sec. 9; Wyoming, Art. I. sec. 20). One strong cause of the retention of this power in criminal cases in general, was the apprehension felt of the judge who, in England, was the creature of the Crown. This would be especially the case in indictments for libel, particularly if the alleged libel were against the Government. Whatever may have been the necessity for such a rule in England, it is clear there has been no necessity for it here since the Declaration of Independence. Still, it has been copied in constitution after constitution, even down to the present day.

It is further to be noticed that in Mississippi (sec. 20) and in Kentucky (sec. 9) the jury may determine the law as well as the facts in criminal cases of libel only; but in Wyoming (Art. I. sec. 20) they have this power in civil cases of libel as well as in criminal cases. It would be curious to inquire into the cause of this extension of an already unnecessary power.

The common clause in constitutions forbidding the taking of private property for public use without compensation, and its treatment in these new constitutions, is also worthy of notice.

The narrowing influence of the common law upon lawyers is shown by the fact that this provision has been strictly construed by the courts, instead of being liberally construed, as all provisions should be when the rights, property, or liberty of the subject are affected, against his will, for the general good. It is unnecessary to cite cases, for it is well known to all lawyers that the rule of decision has been that if there is no actual *taking*, there is no claim to compensation, no matter how much the property may be injured, — even admitting there has been a tendency of late to relax this rule.

To make sure of justice, several States, since 1869, have embodied in their constitutions provisions that private property shall not be "damaged" or "injured," as well as "taken," for public purposes without compensation. Even this has not always been enough, however; for the construction of these provisions has not been uniform. See Stetson *v.* C. & E R. Co., 75 Ill. 74; C. M. & S. P. R. Co. *v.* Hall, 90 Ill. 42; *contra*, Rigney *v.* Chicago, 102 Ill. 64; P. S. V. R. Co. *v.* Walsh, 124 Penn. 544.

The new constitution of Mississippi, following the above innovation on the old rule, provides (sec. 17) that private property shall not be taken or damaged for public use, except on due compensation being first made to the owner in a manner to be prescribed by law. It further provides that the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public. So in Wyoming (Art. I. sec. 33), "Private property shall not be taken or damaged for public or private use, without just compensation." And section 32 in the same State, enlarging the power of eminent domain, provides that private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes, or ditches, on or across the lands of others, for agricultural, mining,

milling, domestic, or sanitary purposes; nor in any case without due compensation. But in Kentucky, in spite of the jealousy shown towards corporations, section 13 only provides that a man's property shall not be taken or applied to public use without just compensation being previously made to him; and it is also remarkable that Idaho retains the old imperfect form.

In Wyoming (Art. I. sec. 31), we find an illustration of the extension of the power of the State when the public good requires it: "Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the State, which, in providing for its use, shall equally guard all the various interests involved." So in Idaho (Art. I. sec. 14), but much more fully, the necessary use of lands for mining, or for the construction of reservoirs for purposes of irrigation, or for drainage, with the necessary pipes, etc., "or any other use necessary to the complete development of the material resources of the State, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the State."

In one important respect provision is made to remedy a serious defect in the older constitutions. Wyoming (Art. I. sec. 8), provides, "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct." The same provision is to be found in Kentucky, but placed among the "General Provisions" (sec. 240), near the end of the constitution.

Bigamy and polygamy are prohibited in Idaho (Art. I. sec. 4), — pointing to a danger from which this State has thus escaped.

In Wyoming (Art. I. sec 19), "No money of the State shall ever be given or appropriated to any sectarian or religious society or institution,"— as if to render more certain than ever the complete separation of Church and State. In Mississippi (sec. 18), religious liberty, however, shall not be construed "to exclude the Holy Bible from use in any public school in this State." In Kentucky (sec. 5), "Nor shall any man be compelled to send his child or children to any school to which he may be conscientiously opposed."

And in conclusion of this examination of some of the new features in these Bills of Rights, there is in Mississippi (sec. 20) the unique provision: "No person shall be elected or appointed to office in this State for life or during good behavior, but the term of all offices shall be for some specified period."

The provisions concerning corporations in these constitutions

illustrate the increasing complexity of our life and times, the extent to which legislation is embodied in constitutions, and the fears entertained that corporations will abuse their powers unless restrained by constitutional restrictions, and that weak or corrupt Legislatures will legislate in their favor, unless they, too, are similarly restrained. In each State a special subdivision is devoted to them.

Corporations are defined in Mississippi (sec. 199) to include all associations and all joint-stock companies for pecuniary gain, having privileges not possessed by individuals or partnerships. Similarly, in Idaho (Art. XI. sec. 16), the term includes all associations and joint-stock companies having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships. In Kentucky (sec. 216) "corporation" embraces all joint-stock companies and associations.

In Kentucky (sec. 3) "Every grant of a franchise, privilege, or exemption shall remain subject to revocation, alteration, or amendment." So in Mississippi (sec. 178). In Idaho (Art. I. sec. 2), "No special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the Legislature." The language used in Wyoming (Art. I. sec. 30), is not so clear and explicit. "Corporations, being creatures of the State, endowed for the public good with a portion of its sovereign powers, must be subject to its control."

Corporations shall be formed under general laws only (Miss., sec. 178; Idaho, Art. XI. sec. 2; Wy., Art. X. sec. 1). In Mississippi (sec. 178) no charter for any private corporation for pecuniary gain shall be granted for more than ninety years.

No corporation in existence at the adoption of the new constitution shall have the benefit of future legislation without first filing in the office of the Secretary of State an acceptance of the provisions of this constitution (Ky., sec. 198; Wy., Art. X., sec. 5; Miss., sec. 179; Idaho, Art. XI. sec. 7); but in the last State, municipal corporations in existence at the time of the adoption of the new constitution are excepted.

No foreign railroad corporation shall be entitled to exercise the right of eminent domain, or to any right of way, or to acquire real estate for any purpose, until it shall become a body corporate pursuant to the laws of the State (Ky., sec. 219).

In Mississippi (sec. 197) no grant of any right or privilege and no exemption from any burden shall be made to any foreign corpo-

ration, except on condition that organization shall first be affected under the laws of this State and the business of such corporation shall be carried on thereunder.

No corporation formed under the laws of another State shall have any greater privileges than those enjoyed by corporations of similar character created under the laws of this State (Idaho, Art. XI. sec. 10).

Any consolidation of a corporation of Kentucky (sec. 208) with a corporation of another State shall not make it a foreign corporation, but the courts of this State shall retain jurisdiction over that part of the corporate property within the limits of this State. This may give rise to conflict with some law passed by Congress under its power to regulate interstate commerce. To the same effect see Idaho (Art. XI. sec. 14).

Following the lead of California and Washington, Idaho (Art. XII. sec. 1) directs the Legislature to provide by general laws for the incorporation, organization, and classification of cities and towns in proportion to the population.

The property of all private corporations for private gain shall be taxed in the same way and to the same extent as the property of individuals (but banking capital, according to the value thereof, etc.) (Miss., sec. 181); but provision may be made by general laws to authorize cities and towns to aid and encourage the establishment of manufactories, gas-works, water-works, and other enterprises of public utility, other than railroads, within the limits of said cities or towns, by exempting all property used for such purposes from municipal taxation for a period not longer than ten years (Miss., sec. 192).

The power to tax corporations and their property shall never be surrendered or abridged by any contract or grant to which the State or any political subdivision thereof may be a party, but the Legislature may grant exemption from taxation for not more than five years in the encouragement of manufacturing and other new enterprises of public utility, but this shall be done by general laws only (Miss., sec. 182). In addition this convention also passed the "Exemption Ordinance" already cited in full (p. 19).

The right to exercise the power of eminent domain over the property and franchises of all corporations is expressly reserved (Miss., sec. 190; Ky., sec. 203; Idaho, Art. XI. sec. 8; Wy., Art. X. sec. 9, and Art. X. sec. 4, "Railroads"). In all these States in these sections, excepting Wyoming, the right to exercise the police power of the State is also expressly reserved.

No foreign railroad or telegraph line shall do any business without having an agent or agents within each county through which it shall be constructed upon whom process may be served (Wy., Art. X. sec. 8, "Railroads"). In Kentucky (sec. 202), all corporations must have one or more known places of business in the State, and an authorized agent or agents there. So in Idaho (Art. XI. sec. 10).

The influence of the legislation and decisions upon the important class of subjects now known as "Trusts" is apparent throughout these constitutions.

Idaho (Art. XI. sec. 18) prohibits the direct or indirect combination or contract of corporations, associations of persons or stock companies, in any manner whatsoever, to fix the price or to regulate the production of any article of commerce, or of produce of the soil, or of consumption by the people. Wyoming (Art. X. sec. 8) prohibits consolidation or combination of corporations of any kind to prevent competition, to control or influence productions or prices thereof, or in any manner to interfere with the public good and general welfare. In Kentucky (sec. 206) it is made the duty of the General Assembly, as necessity may require, to enact laws to prevent all trusts, pools, combinations, or other organizations from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value.

No transportation corporation shall issue stocks or bonds, except for money, labor done, or in good faith agreed to be done, or property actually received; and all fictitious increase of stock or indebtedness shall be void (Miss., sec. 196).

No corporation shall engage in business other than that expressly authorized by its charter. Nor shall it hold any real estate except such as may be proper and necessary for carrying on its legitimate business for a longer period than five years, under penalty of escheat (Ky., sec. 200); and no corporation doing business as a common carrier shall, directly or indirectly, own, manage, operate, or engage in any other business, or hold, own, lease, or acquire, directly or indirectly, mines, factories, timber or lands, except such as shall be necessary to carry on its business (Ky., sec. 218). Similarly in Wyoming (Art. X. sec. 6) no corporation shall have power to engage in more than one general line or department of business, which line shall be distinctly specified in its charter.

No common carrier shall consolidate or pool its earnings, in whole or in part, with any other common carrier company owning

a parallel or competing line, or operate the same; nor shall any combination or contract be made between common carriers by which the earnings of one doing the carrying are to be shared by the other, not doing the carrying (Miss., sec. 197).

The familiar principle of law that an employer is not liable for injury to his servant caused by the negligence of a fellow-servant is further abrogated as to railroads in Mississippi (sec. 193). Any agreement, express or implied, to waive the benefit of this section shall be null and void, and the Legislature is authorized to extend the remedies herein provided to any other class of employers. In Wyoming (Art. X. sec. 4) no law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person, and any contract or agreement with any employee waiving such right shall be void. The employees of all corporations doing business in this State are to be protected by legislation from interference with their social, civil, or political rights by said corporations, their agents or employees (Miss., sec. 191).

Idaho (Art. XI. sec. 17) provides that dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him.

It seems strange that the individual liability of stockholders, a subject of the first importance, should not be determined in the other constitutions under consideration, especially when we find them all treating so minutely of less important matters that should have been left to legislation.

All corporations engaged in the transportation of persons, property, mineral oils and mineral products, news or intelligence, including railroads, telegraphs, express companies, pipe lines, and telephones, are common carriers (Wyoming, Art. X. sec. 7). So in Mississippi (sec. 195), are express, telegraph, telephone, and sleeping-car companies.

Any association, corporation, or lessees or managers thereof, organized for the purpose, or any individual, may construct and maintain telegraph or telephone lines, and connect the same with other lines (Idaho, Art. XI. sec. 13; Ky., sec. 207), with the additional provision that said companies shall receive and transmit each other's messages without unreasonable delay or discrimination; and all such companies are common carriers. But cities or towns shall control their own streets, etc., and designate where and how the wires of said companies shall be erected or laid. All store-

houses where grain or other property is stored for compensation, whether the property stored be kept separate or not, are declared to be public warehouses, and subject to legislative control (Ky., sec. 214).

All railroads are public highways (Miss., sec. 184; Idaho, Art. XI. sec. 5). The rolling-stock of railroad corporations is personal property (Miss., sec. 185; Ky., sec. 220). Any company organized for such purpose, under the laws of the State, may construct and operate a railroad between any points within the State, and connect at the State line with roads of other States (Miss., sec. 184; Idaho, Art. XI. sec. 5). The Legislature may regulate and control by law, rates of charges and freights (Idaho, Art. XI. sec. 5). Every railroad company may intersect, connect with, or cross any other railroad (Miss., sec. 184; Ky., sec. 225 [when reasonable, Idaho, Art. XI. sec. 5]; Wyoming, Art. X. sec. 1, "Railroads"), with the additional statement in the last and in Mississippi that all railroads shall receive and transport each other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination.

No railroad shall pass within three miles of any county seat without passing through it, and establishing and maintaining a depot therein, unless prevented by natural obstacles, if such town or its citizens shall grant the right of way through its limits, and sufficient ground for ordinary depot purposes (Miss., sec. 187). The similar provision in Wyoming (Art. X. sec. 9, "Railroads") is that no railroad company shall construct or maintain a railroad within four miles of any existing town or city without providing a suitable depot at the nearest practicable point for the convenience of said town or city, and stopping there all trains doing local business; and no railroad company shall deviate from the most direct practicable line to avoid the provisions of this section. Idaho (Art. XI. sec. 11) recognizes the principle of local control by providing that no railroad shall be constructed in any city, town, or incorporated village without the consent of the local authorities.

In Wyoming (Art. X. sec. 5, "Railroads"), neither the State nor any county, township, school district, or municipality shall loan or give its credit, or make donations to or in aid of any railroad or telegraph line. In Idaho (Art. XI. sec. 12), the Legislature shall pass no law for the benefit of a railroad, corporation, individual or association of individuals, retroactive in its operation.

No county, city, or town, etc., shall subscribe to the capital stock of any corporation or association, or make appropriation or loan its

credit in aid of such corporation or association (Miss., sec. 183; Idaho, Art. XII. sec. 4).

The provisions of the Interstate Commerce Act against greater charge for a shorter than for a longer haul, etc., are followed in Kentucky (sec. 227), and in Idaho (Art. XI. sec. 6).

So the Legislature is directed to pass laws to prevent abuses, unjust discrimination, and extortion (Miss., sec. 186; Idaho, Art. XI. sec. 6; Ky., secs. 204, 221, 222, 223). No common carrier shall be permitted to contract for relief from its common-law liability (Ky., sec. 204). No corporation can lease or alienate any franchise so as to relieve the franchise or property from any liability connected therewith (Ky., sec. 211; Idaho, Art. XI. sec. 15).

No transportation company shall grant free passes or tickets or passes or tickets at a discount to members of the Legislature, or to any State, district, county, or municipal officers, except to railroad commissioners (Miss., sec. 188). In Kentucky (sec. 205), the inhibition is even more severe, judges being also named as included, and no exception is made in favor of railroad commissioners, although a commission is established under section 217; and the penalty for receiving or using such a free pass is declared to be the forfeiture of office.

Common carriers must be made by law to extend the same equality and impartiality to all who use them, excepting employees and their families, and ministers of the gospel (Wy., Art. X. sec. 2, "Railroads").

Wyoming (Art. IX. sec. 3, "Railroads") is the only one of these States that provides that an annual report shall be made to the State auditor of its business, and even in this State this applies only to railroad corporations.

Amasa M. Eaton.